STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Stanley A. Oke	)	
	)	
v.	)	
	)	
Northern Illinois Gas Company d/b/a Nicor Gas Company	)	Docket No. 01-0073
	)	
Complaint As To Overcharge Dating Back To April 1996 Or Earlier Based On Improper Assignment To "Rate 4B" Customer Service Charge In Batavia, Illinois	)	

REPLY TO STANLEY A. OKE'S RESPONSE TO MOTION TO DISMISS OF NORTHERN ILLINOIS GAS COMPANY

Northern Illinois Gas Company d/b/a Nicor Gas ("Nicor Gas" or the "Company") hereby respectfully submits its Reply to Stanley A. Oke's Response to the Motion to Dismiss of Northern Illinois Gas Company. As discussed below, the Commission should grant Nicor Gas' Motion to Dismiss because the Petition of Stanley A. Oke ("Petition") fails to state a claim upon which relief can be granted and is barred by the time limitation set forth in Section 9-252.1 (220 ILCS 5/9-252.1) of the Illinois Public Utilities Act ("Act").

I. ARGUMENT

A. The Commission Should Grant Nicor Gas' Motion To Dismiss Because Petitioner's Response Ignores The Fact That Petitioner Is Responsible, As A Matter Of Law, For Selecting His Rate Classification.

Petitioner correctly states that, in order to prevail on a Motion to Dismiss, Nicor Gas must show that even if the facts alleged in the Petition are taken as true, no set of facts can be proved which will entitle Petitioner to relief. However, Petitioner is incorrect in his assertion that the Company has failed to satisfy this standard.

First, Petitioner wholly fails to respond to Nicor Gas' legal arguments concerning the Company's Commission-approved Rate Selection Tariff, which places the ultimate responsibility for rate selection upon the customer. As explained in the Company's Motion to Dismiss, the Rate Selection Tariff was approved by the Commission, and has the force and effect of law. *See Bloom Township High School v. Commerce Comm'n*, 309 Ill.App.3d 163, 175, 722 N.E.2d 676, 686 (1st Dist. 1999) (utility tariff has force of law); *Phillips Elec. Co., Inc. v. Seko Messenger Serv., Inc.*, 235 Ill.App.3d 513, 517, 602 N.E.2d 62, 64 (1st Dist. 1992) (tariff has force and effect of statute); *Illinois Cent. Gulf R.R. Co. v. Sankey Bros., Inc.*, 67 Ill.App.3d 435, 439, 384 N.E.2d 543, 545 (4th Dist. 1978) (same). Because the Rate Selection Tariff has the force and effect of law, as a general proposition, one is precluded from claiming ignorance of the Rate Selection Tariff as a defense. *See In Re Cheronis*, 114 Ill.2d 527, 534, 502 N.E.2d 722, 725 (1986) ("common maxim holds that ignorance of the law is no excuse").

Instead of addressing the foregoing legal arguments, Petitioner asserts that dismissal is improper because:

> [D]ismissing this case would deprive the complainant of his "day in court." Mr. Oke is a long-standing successful owner and operator of Batavia Amoco in Batavia, Illinois. He possesses a Masters in Business Administration and keeps meticulous records for accounting purposes including records of his Nicor gas bills. Mr. Oke or his assistant open every piece of mail delivered to his gas station and Mr. Oke is ultimately responsible for all utility accounts and payments.

Response at 6.[1] In addition to being non-responsive to the Company's valid legal arguments (as well as improperly attempting to distort the standard for a motion to dismiss), Petitioner's argument actually supports the Company's position that Petitioner, as an educated and

[1] The Company notes that counsel for Petitioner adduced these facts, which are based on purported facts that do not appear of record, without a supporting affidavit from Petitioner. *See e.g.* 83 Ill. Admin. Code § 200.190. Accordingly, the Company requests that the Commission disregard such facts, to the extent they have been used to support Petitioner's claims, or in the alternative, that Petitioner be required to provide a proper affidavit.

sophisticated utility customer, is presumed to be aware of his obligations under the Rate Selection Tariff as a matter of Illinois law. Accordingly, and as stated in the Company's Motion to Dismiss, Petitioner cannot properly be allowed to complain due to his own failure to comply with the Commission-approved Rate Selection Tariff by either seeking the Company's assistance in selecting his rate classification, or by selecting the appropriate rate classification himself.

Second, Petitioner claims that Nicor Gas erroneously assumes "(1) that Mr. Oke could choose his meter capacity; and (2) that because he failed to respond to a survey, the company could assign him a higher rate than what his existing usage pattern and equipment indicated." Response at 5. Petitioner's argument is a "red herring" and does not preclude dismissal.

Specifically, Petitioner's Response asserts that dismissal is not proper in this case because Nicor Gas' Rate 4 classifications are based on meter class capacity, and thus, there is a question of fact regarding whether Nicor Gas was "best qualified to determine the appropriate meter class." Response at 6. However, even if the Commission construes this fact in the light most favorable to the Petitioner, whether Nicor Gas is in the best position to determine the appropriate meter class is wholly irrelevant for purposes of the Company's Motion to Dismiss, as it does not in any way relieve Petitioner's ultimate responsibility under the Commission-approved Rate Selection Tariff (which has the force and effect of law) to seek assistance from the Company in selecting his rate classification. In addition, as a factual matter, and as explained in the Company's Motion to Dismiss (at 5, note 2), the Rate Selection Tariff's requirement that the customer select its rate classification is reasonable from a practical standpoint, since Nicor Gas serves nearly 2,000,000 customers.

Furthermore, Petitioner asserts that the Company assumes that because Petitioner "failed to respond to a survey, the company could assign him a higher rate than what his existing usage

pattern and equipment indicated." Response at 5. Petitioner's claim in this respect is wrong, and mischaracterizes the Company's position. Indeed, while the Company's Motion to Dismiss states that the Company, consistent with the Rate Selection Tariff, sent bill inserts to all customers explaining the rate classifications, instructing customers on how to properly calculate their bills, and encouraging customers to contact the Company if they required further assistance in determining their charges, *nowhere* in the Motion to Dismiss does the Company mention a rate classification survey, let alone make any claim regarding Petitioner's failure to respond to such a survey. In any event, even if the Commission construes these facts in a light most favorable to Petitioner, Petitioner's argument must fail because the facts alleged by Petitioner would not relieve Mr. Oke of his obligation to comply with the Rate Classification Tariff.

Based on the foregoing, even when construed in the light most favorable to the Petitioner, the facts alleged in the Petition fail to state a claim upon which relief can be granted, and the Petition should therefore be dismissed as a matter of law.

B. Petitioner's Claim For Refunds Retroactive To April 1996 Is Barred Under Section 9-252.1 Of The Act.

Petitioner claims that the limitations period set forth in Section 9-252.1 of the Act is controlling in this case. As Petitioner correctly notes, Section 9-252.1 adds a "discovery" provision to the two-year limitations period set forth in Section 9-252. Specifically, Section 9-252.1 states, in relevant part:

> Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the date the customer first has *knowledge* of the incorrect billing. (Emphasis added).

Petitioner erroneously claims, however, that "[s]ince Mr. Oke did not discover the overcharge until on or about July 1, 2000, Section 252.1 clearly applies in this case and provides Mr. Oke with the additional protection by allowing him until July 2002 to file his complaint." Response

at 4. Petitioner's argument is based on the faulty assumption that the two-year limitations period in Section 9-252.1 began to run when Petitioner first had *actual* knowledge of the incorrect billing, that is, on or about July, 2000.

Petitioner's interpretation, however, is directly contrary to the Commission's past precedent regarding the knowledge requirement in Section 9-252.1. In fact, the Commission has interpreted the term "knowledge" as used in Section 9-252.1 as meaning "constructive knowledge" as opposed to "actual knowledge." For example, in *Chebanse Grain and Lumber Co. v. Northern Illinois Gas Co.*, I.C.C. Docket No. 97-0079, 1997 Ill. PUC LEXIS 821, which also concerned a motion to dismiss filed by Nicor Gas, the Commission considered the issue of when the Complainant first had knowledge of an alleged incorrect billing for the purposes of calculating the limitations period in Section 9-252.1. Contrary to Petitioner's position in this case, the Commission concluded that the two-year limitations period began to run when the Complainant had "constructive knowledge" of the complained-of action. *Id.* at *15.

As a matter of Illinois law, there is a significant distinction between "constructive knowledge" and "actual knowledge." *See First Fin. Funding Corp. v. Roswell*, 302 Ill.App.3d 639, 645, 707 N.E.2d 60, 64 (1st Dist. 1998). Illinois courts have held that, "one is deemed to have constructive knowledge of such facts as one would have known by the exercise of reasonable care." *Id.*, 302 Ill.App.3d at 646, 707 N.E.2d at 65. *See also Smolek v. K.W. Landscaping*, 266 Ill.App.3d 226, 228-29, 639 N.E.2d 974, 977 (2nd Dist. 1994).

Applying these principles to the instant case, it is clear from Petitioner's Complaint that Petitioner had constructive knowledge of his incorrect rate classification in April, 1996. Specifically, the attachments to Petitioner's Complaint show Petitioner's *own* meticulous calculations of overcharges for each month from May, 1996 to September, 2000. In addition,

Petitioner's calculations for each month from December, 1996 to September, 2000 detail the date of the bill, the monthly customer charge, the total delivery charge and the total bill. Furthermore, Petitioner does not allege in his Complaint – nor could he – that he now has access to information concerning his rate classification that was not otherwise available to him through the exercise of reasonable care from April, 1996 forward. In sum, the Petition itself clearly shows that Petitioner had constructive knowledge of his improper rate classification as early as April, 1996, and for that reason, the Petition, which was filed on January 25, 2001, is barred under the two-year limitation period set forth in Section 9-252.1.

II.
CONCLUSION

Based on the foregoing, the Commission should grant Nicor Gas' Motion to Dismiss the Petition of Stanley A. Oke because it fails to state a claim upon which relief can be granted and is barred by the time limitation set forth in Section 9-252.1 of the Act.

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
d/b/a NICOR GAS COMPANY

By 
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that copies of the Reply to Stanley A. Oke's Response to Motion to Dismiss of Northern Illinois Gas Company were served upon the attached service list in the manner specified this 29th day of May, 2001.

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